

## **"COMMON TRANSPORT" IS NOT UNBUNDLED INTEROFFICE TRANSMISSION FACILITIES**

On September 30, 1996, WorldCom filed a Petition for Clarification in Docket 96-98. WorldCom notes -- and Ameritech agrees -- that "it is clear" that ILECs must provide an end office-to-tandem link as shared transport and the tandem-to-SWC link as dedicated transport. WorldCom concedes that it is "not clear" whether the Commission's rules require ILECs to provide "tandem-switched transport on a network element basis . . . ." WorldCom asks the Commission to clarify that ILECs must provide ". . . tandem-switched transport as a single, combined network element pursuant to an end-to-end, usage-based rate with airline mileage measured between the end office and the SWC . . . ." See Petition for Clarification, pp. 1-2.

Likewise, AT&T in numerous *ex partes* filed in this docket contends that "shared transport" is synonymous with tandem-switched transport. Similar to WorldCom, AT&T claims that "shared transport is a blended, direct-trunked and tandem-trunked arrangement with tandem switching included." See AT&T letter from Bill Davis to Ameritech, dated May 14, 1997.

### **1. Statutory Definitions And Principals**

- The definition of Network Element requires access to a particular facility or equipment. The Act defines "network element" as a "facility or equipment" used to provide a telecommunications service. A network element also includes features, functions, and capabilities that are provided "such facility or equipment ...." Therefore, in order to obtain a "feature, function or capability," -- as a network element -- the requesting carrier must designate a discrete facility or equipment, in advance, for a period of time.
- The Commission's recent interpretation of "facilities" in the Universal Service docket is consistent with the statutory definition of network element. The Commission construed the term "facility" as used in Section 214(e) to refer solely to "physical components of the telecommunications network that are used in the transmission or routing" of calls. See ¶¶ 150-151. Notwithstanding fn. 388 of the Universal Service Order, this interpretation is consistent with the statutory definition of network element and confirms that an interpretation of "network" which would include undifferentiated access to features and functionality, without obtaining access to a particular facility or equipment is inconsistent with the statutory definition of network element.
- On-demand, and undifferentiated access to the features, functions and capabilities provided by multiple elements is a service. The definition in the Act does not support an interpretation that a requesting carrier can purchase undifferentiated access to network capabilities, without purchasing access to a

particular facility or equipment used to provide telecommunications service. Obtaining on-demand, undifferentiated use of the functions and capability of the public switched network is the purchase of a service, not access to a network element. Such an interpretation would eliminate any difference between access to a network element or purchase of a service.

- **The FCC's First Report and Order in CC 96-98 recognizes the clear difference between "network elements" and "services."** In distinguishing between network elements and services, the Commission noted that a carrier purchasing access to network elements must pay for that facility, and faces a risk that it may not have sufficient demand for services "using that facility" to recoup its costs. In contrast, a carrier using resold services does not face this risk. See First Report and Order at ¶ 344. (Emphasis added)
- **Section 251(c)(3) does not transform a service into an unbundled network element.** A CLEC has the right to combine an unbundled network element with another unbundled network element, but each network element that is combined must be capable of being provided on an unbundled basis in the first instance. However, as a matter of engineering fact, common transport -- as defined by WorldCom and AT&T -- cannot function without tandem switching, and cannot be provided as a stand-alone unbundled network element separate from any other element.

## **2. Docket 96-98 Did Not Address "Common Transport"**

- **The First Report and Order required unbundled shared and dedicated transport, it did not require a "single, combined network element" comparable to tandem switched transport.**
  - For example, in ¶ 440 the Commission's Order requires ILECs "to provide unbundled access to shared transmission facilities between end offices and the tandem switch."
  - The Commission also required ILECs to provide "unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers."
  - The Commission's rationale was premised in part on the Competitive Checklist Item V which requires that local transport be "unbundled from switching or other services." See e.g., fn. 986
  - Likewise in discussing its proxy pricing for shared transmission facilities, the Commission clearly stated that it did not include any rates for "tandem switching" and therefore its rules for unbundled transport were not

inconsistent with the Court of Appeals decision in Comptel v. FCC. See ¶ 823.

- Finally, with respect to tandem switching, the Commission's Order in ¶ 425 requires an ILEC to provide "access to their tandem switch unbundled from interoffice transmission facilities."
- **Common Transport is a service, not a network element.**
  - Identical to "tandem-switched transport," an existing access service. See First Report and Order in Docket 96-262 at ¶ 158
  - Undifferentiated access to the entire interoffice transport and tandem switching infrastructure
  - Identical routing, trunk ports, trunks and tandem switching that is used to provide local and toll usage and switched access service
  - A bundled service, under which CLECs provide no engineering, no routing, no designation of any specific facilities or equipment
- **The "blended rate" advocated by WorldCom and AT&T is also inconsistent with the Commission's recent decision in the access charge reform order.**
  - See e.g. ¶¶ 158-194 of that Order, rejecting the so-called unitary rate structure for tandem-switched transport.
- **There is no record evidence to support a conclusion that common transport was included in the First Report and Order.**
  - Terminating recording and measurement at the end office
  - Identification of the originating carrier for local calls over common transport trunks or ports
  - Rate structure or proxy pricing for a "blended" rate for tandem and direct routed calls
  - Application of switched access charges and so-called meet-point billing arrangements

### **3. Shared Transport -- As Defined In 96-98 -- Gives CLECs A Meaningful Opportunity To Compete.**

- **Ameritech complies with the FCC's "shared transport" network element requirements**
  - Ameritech's approved interconnection Agreements make available dedicated and shared interoffice transmission as a network element.
  - Ameritech has also offered another variation, called Shared Company Transport (see Ex Parte dated 2/25/97 and 3/28/97).
  - As these Ex Partes demonstrate, Ameritech's shared transport provides CLECs a meaningful opportunity to enter using this network element.
- **Ameritech also offers a carrier the opportunity to combine an unbundled local loop and unbundled local switching line card with common transport service.**
  - The debate is not whether CLECs have a viable opportunity to compete; they do.
  - The real issue boils down to price arbitrage and revenue shifts.



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**James K. Smith**  
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June 23, 1997

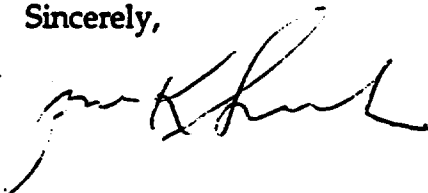
Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

Re: **Ex Parte Presentation**  
**CC Docket 96-98**

Dear Mr. Caton:

Please include the attached Ameritech Position Paper on Shared Transport in the record of this proceeding.

Sincerely,



RECEIVED  
JUN 23 '97  
FEDERAL COMMUNICATIONS  
COMMISSION  
OFFICE OF SECRETARY



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H. Edward Wynn  
Vice President &  
General Counsel

May 22, 1997

Christine T. Pirik, Chief  
Telecommunications Division  
Public Utilities Commission of Ohio  
Telecommunications Division  
180 East Broad Street  
Columbus, Ohio 43215-3793

Dear Chris:

As we discussed, enclosed is Ameritech's Position Paper on Shared Transport and the Unbundled Network Element Platform. I am also sending a copy by messenger to Bruce Bennett of AT&T.

If you have any questions about the paper or any other matter, please call me.

Sincerely,

A handwritten signature in cursive script, reading "H. Edward Wynn".

Enclosure

cc: Bruce Bennett, AT&T

# **SHARED TRANSPORT AND THE UNBUNDLED NETWORK ELEMENT PLATFORM: AMERITECH'S POSITION PAPER**

## **Introduction**

This document provides an analysis of the current debate regarding the Interoffice Transport Element known as Shared Transport. In particular, the debate focuses on Shared Transport when it is used as part of the Combination of Network Elements which is provided for in the AT&T and Ameritech Interconnection Agreements (the "Interconnection Agreements") and which has been referred to as the "Network Element Platform."<sup>1</sup> As demonstrated below, Ameritech's definition of Shared Transport is consistent with the terms and conditions of the Interconnection Agreements, the Telecommunications Act of 1996 (the "Act") and applicable FCC Rules.<sup>2</sup> AT&T's definition of Shared Transport as "Common Transport" service is inconsistent with the Interconnection Agreement, the Act, and the FCC Rules.

## **Summary of Ameritech's Position**

- **The definition of Network Element requires access to a particular facility or equipment.** The Act defines a Network Element as "a facility or equipment" used to provide a telecommunications service. A Network Element also includes features, functions, and capabilities that are

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<sup>1</sup>The Network Element Platform is described in Schedule 9.3.4 of the Interconnection Agreements. Shared Transport is described in Schedule 9.2.4, Section 1 of the Interconnection Agreements.

<sup>2</sup>Those Rules are found at 47 C.F.R. Section 51.1 *et seq.*



provided by "such facility or equipment. . ."<sup>3</sup> Therefore, in order to obtain a "feature, function or capability," – as a Network Element – the requesting carrier must designate a discrete facility or equipment, in advance, for a period of time.

- A Network Element includes features, functions and capabilities provided by such element. Ameritech agrees that Network Elements should be broadly construed to include all features, functions and capabilities provided "by such facility."<sup>4</sup> However, the definition in the Act does not support an interpretation that a requesting carrier can purchase undifferentiated access to network capabilities, without purchasing access to a particular facility or equipment used to provide a telecommunications service. Obtaining on-demand, undifferentiated use of the functions and capability of the public switched network is the purchase of a service, not access to a Network Element. Such an interpretation would eliminate any difference between access to a Network Element or purchase of a service.
- The FCC Order recognizes the clear difference between a "Network Element" and "services." The FCC has correctly concluded that a Network Element is a "facility and not a service."<sup>5</sup> The FCC noted: "when interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access "services." They are

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<sup>3</sup> Act, Section 3(29).

<sup>4</sup> See FCC Order at Paragraph 262.

<sup>5</sup> FCC Order at Paragraph 343.

purchasing a different product, and that product is the right to exclusive access or use of an entire element.”<sup>6</sup> Likewise, in distinguishing between Network Elements and services, the FCC noted that a carrier purchasing access to Network Elements must pay for that facility, and faces a risk that it may not have sufficient demand for services “using that facility” to recoup its costs. In contrast, a carrier using Resale Services does not face this risk.<sup>7</sup>

- Common Transport is a service, not a Network Element. In addition to being a “facility or equipment” a Network Element must be unbundled.<sup>8</sup> Specifically, Shared Transport cannot include switching or other services.<sup>9</sup> AT&T’s re-definition of Shared Transport to mean “Common Transport” is inconsistent with the definition of Shared Transport in the FCC Rules since Common Transport cannot be a Network Element because it is a service that includes switching. AT&T’s requirements for “Common Transport” also violate the FCC Rules. The FCC Rules require Ameritech to provide Shared Transport to allow carriers to connect their Collocated facilities to such Shared Transport.<sup>10</sup> As AT&T admits, this cannot be done under its “Common Transport” requirements.

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<sup>6</sup> FCC Order at Paragraph 358.

<sup>7</sup> See FCC Order at Paragraph 334.

<sup>8</sup> Act, Section 251(c)(3).

<sup>9</sup> Act, Section 271(c)(2)(B)(v).

<sup>10</sup> 47 C.F.R. Section 51.319(d)(2)(iii).

## **Local Exchange Competition: An Overview**

The Act provides two basic methods of local exchange competition:

Resale of local exchange service and facilities-based provision of local exchange service. As further described below, these methods are not mutually exclusive: although a local exchange provider may choose to offer local exchange service exclusively either on a Resale or facilities basis, a provider can use both methods at any point in time to provide local exchange service to its customers.

### **I. Resale**

Resale enables a local exchange provider to quickly offer the same local exchange telecommunications services that an Incumbent Local Exchange Carrier (or "ILEC") offers.<sup>11</sup> For the ILEC, the primary difference between Resale and retail provision of telecommunications services is that the Reseller assumes (1) end user customer servicing responsibilities, e.g., end user customer billing and on-going customer service, and (2) retail marketing responsibilities, e.g., advertising and pricing, related to providing local exchange service. In all other respects, what is provided by the ILEC to a Reseller and what the ILEC provides at retail to its own customers, is identical. For that reason, when a customer switches from an ILEC to a Reseller and keeps exactly

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<sup>11</sup>The Act contains two Resale obligations. One Resale obligation, the duty to provide Resale at discounted ("wholesale") rates, applies only to ILECs. See Act, Section 251(c)(4). The other Resale Obligation, which applies to both ILECs and LECs, provides for Resale at retail rates. See Act, Section 251(b)(1). The Resale obligation discussed in this paper is the Section 251(c)(4) wholesale Resale obligation.

the same telecommunications services that the customer has at the time of the carrier change, the ILEC is only required to make certain record changes to the account to reflect that the Reseller will now provide billing and customer servicing for the customer.

Specifically, a Reseller has no obligation to design or engineer a local exchange network. Instead, it uses the ILEC's existing telecommunications services, exactly as those telecommunications services are provided to the ILEC's retail customers. Thus, the Reseller is not required to have technical and operational expertise. A Reseller typically will not distinguish itself based on operational or technical capabilities; instead, it will attempt to distinguish itself based on superior marketing, customer servicing, or its ability to provide and package non-local exchange telecommunications services.

A Reseller's primary obligation is to provide end user customer servicing and billing. The ILEC provides only the information the Reseller needs to bill its customers. The Reseller must determine how and at what prices it will bill its customers.<sup>12</sup> For example, the Reseller could offer different billing options for its customers and could offer both different prices and pricing plans than those offered by the ILEC. Significantly, however, the ILEC only bills the Reseller (at wholesale rates) for the telecommunications services that the Reseller orders

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<sup>12</sup>Contrary to AT&T's recent assertions, a Reseller is not required to mirror the rate structures and pricing of the ILEC. Resellers use alternative pricing plans and prices as a way to distinguish themselves from the ILEC. Moreover, AT&T's sudden disfavor for "mirrored" Resale rate structures is hypocritical. Initially, Ameritech had proposed non-mirrored, postalized rate structures for Resale Services. AT&T vehemently opposed such structures, making arguments directly contrary to those it now makes. See pages 23-26 of AT&T's Initial Brief filed on April 13, 1996 in Illinois Commerce Commission Docket No. 95-0458/95-0531. A copy of AT&T's brief will be provided upon the Commission Staff's request.

and its customers use, thus virtually eliminating the risk that the Reseller will have to pay for services or facilities that its customers may not demand.

Resale provides a quick market entry vehicle for a new local exchange provider, not only because Resale minimizes a local exchange provider's up-front capital investment, but because Resale allows for ubiquitous geographic coverage. With Resale, a local exchange provider may offer services everywhere the ILEC offers such services, and thus may effectively use mass-market advertising such as newspaper or television, which cover a wide geographic area. In addition, a Reseller does not need to establish Interconnection with the ILEC or other local exchange providers; it relies on the ILEC to arrange for such Interconnection so that the Reseller's customers may receive and place calls to other local exchange providers' customers.

For those reasons, a new local exchange provider often uses Resale as an initial market-entry vehicle.<sup>13</sup> Resale enables a provider to quickly gain customers and then, when that provider has a sufficient number of customers in the same geographic area, it can begin providing facilities-based services to such customers. Such a migration strategy enables a new local exchange

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<sup>13</sup> By analogy, Sprint became the first of AT&T's long distance competitors to offer nationwide long distance service by reselling AT&T's outbound Wide Area Telephone Service (WATS).

provider to reduce its entry risks and to effectively manage and stage its capital investments.<sup>14</sup>

## **II. Facilities-Based Provision of Local Exchange Service**

The other principal method for providing local exchange service requires a local exchange provider to use either its own facilities, or self-provided facilities in combination with those obtained from third parties (including an ILEC), to offer local exchange service to its customers. To promote facilities-based provision of local exchange service, the Act requires ILECs and all other telecommunications carriers to provide Interconnection (so that a facilities-based local exchange provider's customers can receive and place calls to the ILEC's customers), and it also requires ILECs to provide access to certain unbundled Network Elements so that a facilities-based provider can obtain, from the ILEC, the facilities it needs to offer its telecommunications services.

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<sup>14</sup> AT&T claims that it also needs this provisioning experience with customers' usage of local services so that it can design its own network. While such customer information can be obtained from that experience, it is certainly not the only way such information can be obtained. Most of the large business customers that AT&T or another new local exchange provider would initially target routinely provide information about their local (and long distance) telecommunications usage during the sales process. In addition, AT&T could request its new or prospective customers' service records to obtain this information. See Act, Section 222(c)(2). Obviously, AT&T would receive the same customer usage information if it purchased Resale Services.

Further, Ameritech disagrees that the science of engineering a carrier's initial local telecommunications network is as precise as AT&T suggests. Many carriers, including MFS and TCG, have been able to successfully design initial local networks for years without the need to rely on actual local exchange service experience. Indeed, Ameritech suspects that AT&T has already performed such local network design in each of the Ameritech states, as indicated from its selected method of Interconnection with Ameritech under each of the Interconnection Agreements. Although more detailed information concerning AT&T's local market entry plans may be proprietary, should AT&T continue to assert its alleged lack of ability to provide basic local network design information until it has actual customer experience, the Commission could quickly resolve this issue by requiring AT&T to provide any local network design information AT&T currently has developed.

Regarding the latter requirement, the FCC Rules and FCC Order permit a facilities-based provider to obtain all of the facilities that it needs to offer Local exchange service from the ILEC, and do not require a facilities-based provider to use any of its own facilities.<sup>15</sup> As discussed above, the combination of unbundled Network Elements that includes all the facilities, including Shared Transport, that a local exchange carrier needs to provide local exchange service is known as the unbundled Network Element Platform.

Facilities-based provision of local exchange service is different from Resale in several ways. First, a facilities-based provider of local exchange service is responsible for designing and engineering its local exchange network, regardless of whether it provides all of its own facilities or obtains some or all of those facilities from others. This requires a facilities-based provider to have operational or technical expertise, such as the ongoing ability to forecast the number and type of facilities and equipment needed to provide local exchange service.

In addition, a facilities-based provider, unlike a Reseller, can distinguish itself based on better facilities since a facilities-based provider may design its network differently from the ILEC's and may provide its services at either a higher or lesser quality than the ILEC.<sup>16</sup> Two examples of a facilities-based provider's attempt to distinguish such network capabilities would include: (1)

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<sup>15</sup> Although Ameritech and other ILECs contend that the FCC Rules and FCC Order in this regard are inconsistent with the Act, Ameritech has agreed, subject to the outcome of the currently-pending appeal of the issue, to provide a combination of the FCC-required Network Elements and will not require a facilities-based provider to provide some of its own facilities.

Sprint's promotion of its allegedly superior fiber-based network (Sprint's "pin-drop" advertising campaign) and (2) AT&T's promotion of the superior voice-grade quality of its network (AT&T's "True Voice" advertising campaign, featuring Whitney Houston).

Second, a facilities-based provider, particularly a facilities-based provider that utilizes its own switching functionalities has the ability to offer services to its customers that the ILEC cannot provide, or chooses not to provide, to its customers.<sup>17</sup> For example, an ILEC's switches may not be able to provide certain services that a new local exchange provider's switches can provide, or an ILEC's switches may be able to provide such services if it purchased additional software from the switch manufacturer, but the ILEC has chosen not to purchase such software.

Third, because a facilities-based provider must determine the design and engineering of its network, including, but not limited to, the quantities of facilities and equipment needed for its network, it makes the decision about the quantity and location of the facilities and equipment it needs to provide services to its customers. In all cases, some custom, manual work is required to provision those Network Elements consistent with the provider's selected network design and to connect those Network Elements to the provider's existing facilities.<sup>18</sup>

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<sup>16</sup> See 47 C.F.R. Section 51.311(c).

<sup>17</sup> Such an ability is not limited to switching. For example, a facilities-based provider that provides its own Loops may offer Loop types that an ILEC does not provide, such as Loops capable of high-speed data transmission or supporting full motion video services.

<sup>18</sup> Paragraph 421 of the FCC Order discusses some of these differences.



Fourth, and somewhat obviously, a facilities-based provider's offering of local exchange service, unlike a Reseller's, is limited to the locations at which it has facilities. For example, a facilities-based provider cannot offer services in areas in which it does not have or has not obtained from a third-party, trunk-side network facilities. For some facilities-based providers who choose to serve only limited geographic areas, such as the central office business district of a large city, and thus do not choose to serve all customers, this geographic limitation does not hinder their business plans in any way: they can provide service only to those customers in a geographic area they select, but those customers can receive and place calls to subscribers of other providers because of the Act's requirement that all telecommunications providers Interconnect with other requesting carriers.

#### **The Difference Between Resale Services and Network Elements**

Just as there are key differences between the provision of local exchange service on a Resale basis and provision of local exchange service on a facilities basis, there are similar key differences between Resale Services and Network Elements. The essence of those differences is that Resale Services are "services" and Network Elements are "facilities" or "piece parts" of the network.<sup>19</sup>

The FCC recognized precisely this distinction in the FCC Order:

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<sup>19</sup> The difference between a facility and a service is demonstrated by a simple analogy, the difference between renting or leasing an automobile, and hiring a taxi service. While it is true that both use the same facility, an automobile, the taxi service provides more than just that facility—it also provides many more things that make it a service. If I rent or lease an automobile I have additional responsibilities that I do not have if I use a taxi service. In return, I would expect that the price of renting an automobile is generally less than using a taxi service. So, too, it is with Network Elements (the automobile) and Resale Services (the taxi service).

We believe that sections 251(c)(3) [Network Elements] and 251(c)(4) [Resale] present different opportunities, risks and costs in connection with entry into local telephone markets, and that these differences will influence the entry strategies of potential competitors.

If a carrier taking unbundled elements may have greater competitive opportunities than carriers offering services available for resale, they also face greater risks. A carrier purchasing unbundled elements must pay for the cost of that facility, pursuant to the terms and conditions agreed to in negotiations or ordered by states in arbitrations. It thus faces the risk that end-user customers will not demand a sufficient number of services using that facility for the carrier to recoup its cost. A carrier that resells an incumbent LEC's services does not face that same risk.

FCC Order at Paragraphs 332 and 334. See also FCC Order at Paragraph 980 ("Resale, as defined in section 251(b)(1) and 251(c) (4), involves services, in contrast to section 251(c)(3), which governs sale of network elements.")

A good summary of some, but not all of these differences was in the recent testimony of an MCI witness in Illinois. In response to the question: "What is the difference between providing local service via unbundled local switching and resale . . .?", MCI witness Carl Giesy provided the following response:

There's a big difference that can be summarized by saying that one is a network-based approach and the other is a service-based approach. Using unbundled local switching to provide service should be conceptually similar to a new entrant installing its own switch and using that switch to provide service. As a result, given the definition of unbundled local switching, the new entrant should be able to use the leased switching capability to design its own services, just as it would use its own (owned) switching capability to design its own services. Also, when priced properly, using TELRIC principles, unbundled local switching offers the new entrant an underlying cost structure that is similar to that faced by any facilities-based local provider.

The trade-off for this flexibility is that the new entrant will also need to "engineer" this network to ensure that it has all the necessary

piece-parts in all the necessary quantities to provide local service (e.g. loops and transport), that it has properly interconnected with the incumbent LEC and with interexchange carriers, and so forth.

In contrast, resale is much simpler, in that there is nothing for the new entrant to "engineer." A trade-off, however, is that the new entrant that uses resale is less able to design products for end users that are different from the products offered by the incumbent. In addition, because resellers are "tied" to the incumbent LEC's retail products, the resellers are also "tied" to the incumbent LEC's retail price and price structure.<sup>20</sup> In other words, the resellers [sic] underlying cost structure is based on the incumbent LEC's retail structure.

Testimony of Carl D. Giesy on Behalf of MCI Telecommunications Corporation, Docket Nos. 96-0486/96-0569 (March 7, 1997) at 6-7.

***AT&T wants the benefits of both Network Elements and Resale, without the corresponding risks of either. The only way AT&T can hope to accomplish this result is to unilaterally proclaim that Resale Services are Network Elements.***

The Act, the FCC Rules and the FCC Order recognize the fundamental difference between Resale Services and Network Elements. The Act's Resale requirement states that an ILEC has the duty to permit requesting carriers to resell the ILEC's telecommunications services. In contrast, the Act requires an ILEC to provide access to unbundled Network Elements so that a requesting carrier can use such Network Elements to provide its own telecommunications services. Moreover, the Act's definition of a Network Element also recognizes

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<sup>20</sup>As demonstrated in n.12, *supra*, the implication that a Reseller must mirror the ILEC's price structure is simply wrong.

this distinction. A Network Element is defined as a "facility or equipment used in the provision of a telecommunications service."<sup>21</sup> (emphasis added)

The distinction between Resale Services and Network Elements is so fundamental that it is reprised throughout the Act. The Act's joint marketing restriction rests on this distinction: it prohibits large interexchange carriers from jointly marketing their long distance services with Resale Services purchased from an ILEC, but permits such joint marketing when an interexchange carrier is purchasing an ILEC's Network Elements.<sup>22</sup>

Most importantly, this distinction is reflected in the two very different, Act-imposed pricing standards for Resale Services and Network Elements. An ILEC must provide Resale Services at its retail price less the cost the ILEC avoids by selling those services at wholesale rather at retail (*i.e.*, the costs for retail marketing, billing and customer service that the Reseller, and not the ILEC, will perform).<sup>23</sup> However, Network Elements must be priced at their cost plus a reasonable profit.<sup>24</sup> This difference in the pricing standards is entirely consistent with the fundamental distinction between Resale Services as "services" and Network Elements as "facilities."

Paragraph 678 of the FCC order provides one key example of that difference. In describing the differences between TELRIC methodology for

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<sup>21</sup> Act, Section 3(29).

<sup>22</sup> Act, Section 271(e).

<sup>23</sup> Act, Section 252(d)(3).

<sup>24</sup> Act, Section 252(d)(1).

pricing Network Elements and previously-used TSLRIC methodology for determining prices for services, the FCC stated:

The cost of local loops and their associated line cards in local switches, for example, are common with respect to interstate access service and local exchange service, because once these facilities are installed to provide one service they are able to provide the other at no additional cost. By contrast, the network elements, as we have defined them, largely correspond to distinct network facilities. Therefore the amount of joint and common cost that must be allocated among separate offerings is likely to be much smaller using a TELRIC methodology rather than a TSLRIC approach that measures the costs of conventional services.

Finally, consistent with the Act, the FCC Rules and the FCC Order, because an ILEC is providing Exchange Access service to a Reseller when it provides Resale Services, the ILEC is entitled to access charges for providing such access. In contrast, a facilities-based provider is entitled to access charges when it provides Exchange Access service to an interexchange carrier using facilities it provides itself or Network Elements it purchases from an ILEC.<sup>25</sup>

#### **Shared Transport and the Network Platform: Framing the Issues**

The issues regarding the product definition of Shared Transport arose in the context of AT&T's request for the Network Element Platform. When AT&T placed its initial orders for the Network Element Platform, it requested the Network Element Platform by designating it as a "Footprint" and provided only the name of the state in which AT&T wanted such a Footprint. AT&T did not provide to Ameritech any other ordering information specifying the Network Elements that comprised the Network Element Platform other than information

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<sup>25</sup> See FCC Order at Paragraph 980.

identifying those Ameritech retail customers whom AT&T wanted to be switched to its Network Element Platform.

Discussions between Ameritech and AT&T revealed, as did AT&T's subsequently filed lawsuits challenging the Interconnection Agreements, that AT&T was interpreting "Shared Transport" as provided in the Interconnection Agreements to mean "Common Transport," an Exchange Access service that Ameritech and other ILECs (and LECs) provide to interexchange carriers. AT&T contends that the term "Shared Transport" in the Interconnection Agreements and the FCC Rules and FCC Order is synonymous with "Common Transport" service. Ameritech disagrees and believes that "Shared Transport" and "Common Transport" service are not the same. Ameritech believes that what AT&T is requesting when it asks for what it defines as "Common Transport" is not an unbundled Network Element at all, but rather, is a telecommunications service that Ameritech makes available pursuant to its Resale obligation under the Act.

***Why is this issue so important? Why did AT&T raise this issue only as part of discussions related to the Network Element Platform? Why is this an issue that is primarily raised by the large interexchange carriers and not facilities-based local exchange service providers? The answers to these questions stem from the different financial and legal differences between Resale and Network Elements under the Act.***

As discussed above, there are three principal financial and legal differences between Resale and Network Elements under the Act: (1) price, (2)

access charges, and (3) joint marketing. If AT&T is successful at classifying the Network Element Platform, including its definition of Common Transport service, as Network Elements, AT&T will obtain the benefit of lower Network Element pricing, will avoid paying access charges, and will be permitted to jointly market the Network Element Platform with AT&T's long distance services. Put another way, AT&T's attempt to re-classify what it has admitted is not functionally different from Resale is nothing less than a "have your cake and eat it, too" strategy. If AT&T is successful, it would obtain all the functional benefits from purchasing Resale Services (without the corresponding pricing and regulatory treatment that apply to Resale Services), and also obtain all the pricing and legal benefits from treating such a purchase as Network Elements (again, without recognizing the corresponding obligations related to the purchase of Network Elements). For the reasons that follow, Ameritech believes that AT&T's attempt is flatly inconsistent with the Interconnection Agreements, the Act, the FCC Rules and the FCC Order, and must be rejected.

#### **Undisputed Principles**

To narrow the scope of the debate and the issues, following is a list of items as to which Ameritech believes there is no, or cannot reasonably be a, dispute. Ameritech believes that many of these items have been raised as "red herrings" in this debate and believes that they should be put to the side as no longer relevant.

**1. Ameritech's Position on Combinations.** Ameritech is not refusing to provide combinations of Network Elements to AT&T. Ameritech will provide Network Elements to AT&T consistent with the terms of the Interconnection Agreements. The currently pending Eighth Circuit appeal will resolve the issue of whether Ameritech and other ILECs are required to offer the combination of all Network Elements known as the Network Element Platform. Ameritech will provide the Network Element Platform to AT&T and other carriers, subject to the outcome of that or any other appeal. Ameritech believes that the current debate concerning Shared Transport as part of the Network Element Platform will be resolved if the Eighth Circuit concludes that an ILEC is not required to provide the Network Element Platform. If, however, the Eighth Circuit concludes that an ILEC is required to make the Network Element Platform available, the issue regarding the definition of Shared Transport when it is part of that Network Element Platform will still need to be resolved.

**2. Uniform Definition of Network Elements.** Ameritech believes that there is no dispute that the definition of a Network Element is the same when the Network Element is provided either separately or as part of a combination of Network Elements. Put another way, the definition of a Network Element does not change when it is provided as part of a combination of other Network Elements.

**3. Network Elements Must be Provided on an Unbundled Basis.** An ILEC must offer all Network Elements, including Shared Transport, in a manner



that allows a local exchange provider to connect its own facilities to that Network Element. See, e.g. 47 C.F.R. Sec. 51.319(d)(2)(iii).

4. Shared Transport must be Unbundled from Switching. Section 271(c)(2)(B)(v) of the Act requires that Interoffice Transport, which includes Shared Transport, must be unbundled from switching or other services.

5. Resale Services and Network Elements are Not Synonymous. The Act, the FCC Rules and the FCC Order each recognize that Resale Services and Network Elements are different from each other, and thus different terms and conditions apply to an ILECs' offering of Resale Services and its offering of Network Elements. If a service is a Resale Service, a requesting carrier cannot unilaterally elect to designate that service as a Network Element.

6. Act Governs Over FCC Rules and FCC Order; FCC Rules Govern over FCC Order. Under well-established principles of statutory construction, if there is a conflict between an act, and a regulatory agency's implementing rules and orders, the act governs over the rules and orders and the rules govern over the orders.